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4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF WASHINGTON

6 DAROLD R.J. STENSON,

7 Plaintiff,

8 vs.

9 ELDON VAIL, Secretary of
10 Washington Department of
11 Corrections (in his official capacity),
et al.,

12 Defendants.

No. CV-08-5079-LRS

**ORDER GRANTING
STAY**

13 In the captioned action, Plaintiff has filed a complaint for injunctive and
14 equitable relief under 42 U.S.C. Section 1983, alleging violations of his Fifth,
15 Eighth, and Fourteenth Amendment rights. This complaint was filed on
16 November 21, 2008. Plaintiff moves for an order temporarily restraining the
17 Defendants from scheduling or carrying out his execution until the conclusion of
18 the captioned action. (Ct. Rec. 5). Telephonic hearing was conducted on
19 November 24 and November 25.

20 On or about October 29, 2008, Plaintiff commenced an action in the
21 Thurston County Superior Court for the State of Washington which, like the
22 captioned action, seeks declaratory and injunctive relief under the Eighth and
23 Fourteenth Amendments “to be free from arbitrary and capricious Washington
24 Department of Corrections (“DOC”) protocols and procedures” regarding lethal
25 injection. On November 21, 2008, the Thurston County Superior Court entered an
26 order which declined to dismiss Plaintiff’s claims related to lethal injection
27 (although the court did dismiss Plaintiff’s claims related to hanging). The superior
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1 court, however, denied Plaintiff's motion for preliminary injunction, finding
2 Plaintiff had not demonstrated a likelihood of success on the merits. The superior
3 court certified this decision for immediate review pursuant to Washington Rules of
4 Appellate Procedure (RAP) 2.3(b). Pursuant thereto, Plaintiff has filed an
5 interlocutory appeal with the Washington Supreme Court asking it to grant
6 discretionary review and stay the execution currently scheduled for 12:01 a.m. on
7 December 3, 2008.

8 Because of the ongoing and pending proceedings in the Washington courts,
9 a serious question is raised whether, pursuant to *Younger v. Harris*, 401 U.S. 37,
10 49-53, 91 S.Ct. 746 (1971), this federal court should abstain and dismiss the
11 captioned federal action. Important state interests are involved in the litigation
12 before the Washington courts. On the other hand, a federal plaintiff must "have a
13 full and fair opportunity to litigate his constitutional claim" in the course of state
14 proceedings. *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477
15 U.S. 619, 627, 106 S.Ct. 2718 (1986). This court should not abstain unless a
16 plaintiff's constitutional claims can be "timely decided by a competent state
17 tribunal." *Gibson v. Berryhill*, 411 U.S. 564, 577, 93 S.Ct. 1689 (1973). At this
18 juncture, considering the December 3, 2008 execution date, there is considerable
19 uncertainty whether Plaintiff's constitutional claims will be timely decided on
20 their merits by the Washington courts. **ACCORDINGLY, PENDING**
21 **FURTHER ORDER OF THIS COURT, PLAINTIFF'S EXECUTION,**
22 **WHETHER BY HANGING OR LETHAL INJECTION, IS STAYED, AND**
23 **PROCEEDINGS IN THE CAPTIONED ACTION ARE STAYED.** Plaintiff's
24 Motion For Temporary Restraining Order (Ct. Rec. 5) and Motion For Preliminary
25 Injunction (Ct. Rec. 12) are **STAYED**.

26 While this stay has the same effect as a temporary restraining order or
27 preliminary injunction and is based on the policy rationale and reasoning
28 underlying those remedies, this court is not labeling it as such in recognition that it
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1 has not made a final decision on the propriety of *Younger* abstention. At this time,
2 this court is not making any determination regarding likelihood of success on the
3 merits and its stay is not intended to reverse the Thurston County Superior Court's
4 denial of a preliminary injunction. It is still possible that Plaintiff will be afforded
5 a full and fair opportunity to litigate the merits of his federal constitutional claims
6 in the Washington courts, the venue he initially chose for adjudication of those
7 claims. There are a number of different scenarios which could play out with
8 regard to the action commenced in Thurston County Superior Court. Regardless
9 of what the Washington Supreme Court does, or beyond that what the U.S.
10 Supreme Court may do regarding the superior court's denial of the motion for
11 preliminary injunction, the fact remains that the superior court has not dismissed
12 the federal constitutional claims related to lethal injection and has yet to adjudicate
13 those claims on their merits.

14 Of course, in the meantime, Plaintiff or Defendants may seek an
15 interlocutory appeal to the Ninth Circuit Court of Appeals regarding the propriety
16 of this stay order. To the extent a right of an interlocutory appeal does not exist
17 pursuant to 28 U.S.C. Section 1292(a)(1), **THE COURT CERTIFIES THIS**
18 **MATTER FOR AN IMMEDIATE APPEAL TO THE NINTH CIRCUIT**
19 **COURT OF APPEALS ON THE BASIS THAT THIS STAY ORDER**
20 **"INVOLVES A CONTROLLING QUESTION OF LAW AS TO WHICH**
21 **THERE IS A SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION**
22 **AND THAT AN IMMEDIATE APPEAL FROM THE ORDER MAY**
23 **MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THE**
24 **LITIGATION."** 28 U.S.C. §1292(b).

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s/Lonny R. Suko

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